No. 80-1998

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IN THE SUPREME COURT OF THE UNITED STATES

April Term, 1981

WAYNE SHERRARD and
JANET SHERRARD, his wife,
Petitioners,

-v-

DONALD S. OWENS, Judge of Probate Court,
Ingham County, Lansing, Michigan,
MICHIGAN DEPARTMENT OF SOCIAL SERVICES,
FAMILY AND CHILD SERVICES
OF THE CAPITOL AREA, INC.,
LUCILLE BARBER, Individually and as Employee,
Acting Director and Board Member of Family and
Child Services of the Capitol Area, Inc.,
MARY ELLEN HEATER, Individually and as
Employee of Family and Child Services of the
Capitol Area, Inc.,
BARBARA McLEAN, Individually and as
Employee of Family and Child Services of the
Capitol Area, Inc.,
TIMOTHY G. HOLLAND, Attorney at Law, Individually and
as guardian for Candace and Vernita Smith, Minors,
Jointly and Severally,
Respondents.

RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE U.S. SUPREME COURT

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether certiorari should be granted to Petitioners where the rulings against them in the lower courts with regard to their alleged "liberty interest" have been entirely consistent with prior case law, where the lower courts have properly found the Petitioners received all procedural due process to which they were constitutionally entitled, and where Petitioners' reasons for review rely in part on an issue not raised, argued, or decided below.

COUNTER-STATEMENT OF THE CASE

Respondent, Family and Child Services of the Capitol Area, Inc., is a private, non-profit entity which endeavors to find foster home and adoptive placements for children who, for one reason or another, have no active parents. Respondents, Lucille Barber, Mary Ellen Heater, and Barbara McLean, were all employees of Family and Child Services for at least part of the time period apparently subscribed in the Petitioners' original complaint filed in the United States District Court for the Western District of Michigan on or about August 16, 1979.

Family and Child Services of the Capitol Area, Inc. is licensed by Respondent, Michigan Department of Social Services, pursuant to state statute, to provide foster care services for children who are wards of the State. Pursuant to this statutory delegation, the State of Michigan, through the offices of the Probate Court of Ingham County, placed Candace and Vernita Smith in the care of Family and Child Services of the Capitol Area, Inc. The purpose of such placement was for Family and Child Services of the Capitol Area, Inc. to locate appropriate foster family care for the foster children while resolution of their permanent legal status vis-a-vis their natural parents was resolved in the courts.

The Smith girls initially lived as foster children with their grandparents. Later, because of familial tension, the girls were removed to an independent foster home. Still later, on or about May 15, 1978, Family and Child Services of the Capitol Area, Inc. engaged the services of Wayne and Janet Sherrard to take custody of Candace and Vernita Smith as temporary foster parents.

Prior to such placement, on or about April 11, 1978, the Sherrards signed an agreement with Family and Child Services setting forth the context of their services as temporary foster parents (see Supplement to Appendix, page 30).

Pursuant to an Order of Respondent Donald S. Owen, Judge of the Ingham County Probate Court, the children were removed from the Sherrards' home on May 14, 1979, and relocated to another foster family home.

No decision as to the custodial rights of the natural parents was made by the courts in the State of Michigan until June 12, 1979.

On or about August 16, 1979, Petitioners filed a complaint in the U.S. Federal Court for the Western District of Michigan against, among others, Respondents, Family and Child Services of the Capitol Area, Inc., Lucille Barber, Mary Ellen Heater, and Barbara McLean. The complaint apparently alleged that as a result of various acts, said Respondents had denied the Petitioners their constitutional rights in removing Candace and Vernita Smith from their foster home.

On November 9, 1979, a hearing was held before District Court Judge Douglas Hillman with regard to motions to dismiss filed by various defendants in the original action.

On January 14, 1980, Judge Hillman issued his Opinion and Order with regard to Co-Respondents' Motions to Dismiss. The trial court treated the motions as ones for summary judgment, pursuant to Federal Rules of Civil Procedure 12(b)(6) and 56, granted said motions, and indicated Petitioners had failed to state a claim upon which relief could be granted.

Thereafter, on January 17, 1980, a Judgment was entered in the above entitled matter dismissing this matter without prejudice as to all defendants/respondents in accordance with the Opinion and Order of the Court dated January 14, 1980.

During the summer of 1979, Petitioners also pursued the various remedies available to them under state law by invoking the Michigan Administrative Procedures Act. In particular, the Petitioners appealed the Michigan Department of Social Services' decision to deny them renewal of their temporary foster home license.

A decision from the administrative agency with regard to such appeal was issued on or about March 26, 1980, even

though no full hearing was ever held before the administrative agency with regard to the licensing issue (Appendix p. A-6).

In the meantime, Petitioners had taken an appeal to the United States Court of Appeals for the Sixth Circuit. Oral argument before that court occurred on February 9, 1981, and the Court of Appeals' opinion was issued on or about March 18, 1981. The March 26, 1980, opinion of the administrative law judge as to the failure of State Department of Social Services to properly follow its own licensing provisions was thus in existence prior to the perfection of the Petitioners' appeal to the Court of Appeals, and prior to the oral argument in the Court of Appeals.

Despite this fact, Petitioners never raised the issue of the administrative agency's ruling until the filing of the Petition for Writ of Certiorari.

The District Court ruled, in essence (Supplement to Appendix, page 1, et seq), that the Petitioners, given the circumstances of their relationship with the Michigan Department of Social Services and/or Family and Child Services of the Capitol Area, Inc., had no reasonable expectation of continued custody of the Smith children which rose to the level of a constitutionally protected liberty interest. The District Court further held that, even if such liberty interest did exist, any right of procedural due process was, in fact, satisfied by the various opportunities given to Petitioners to present their objections to said removal to appropriate state agencies.

Judges Weick, Lively, and Engle of the United States Court of Appeals of the Sixth Circuit, similarly found that, given the circumstances of this case, there was no constitutionally protected liberty interest present. The Sixth Circuit further found that there was an adequate due process procedure with regard to the revocation of foster home care licenses in the State of Michigan.

Petitioners are now before this Court alleging that the lower courts improperly interpreted prior case law with regard to their alleged liberty interest in continued custody of the foster children. Petitioners further contend, for the first time, that the decision by the state administrative law judge, without full hearing, is binding on the federal courts in resolving the issue of whether Petitioners were afforded that procedural due process to which they were allegedly entitled.

REASONS FOR DENYING THE WRIT

There are three reasons why the writ should not be granted.

First, the decisions of the District Court and Court of Appeals are entirely consistent with prior case law. As a result, there is no "conflict" arising to the level of "special and important reason" to grant the writ within the meaning of the United States Supreme Court Rule 17.

Petitioners contend that the lower courts' decisions are in conflict with *Smith* v *Organization of Foster Families*, 431 US 816, 53 L Ed 2d 14, 97 S Ct 94 (1977). In particular, Petitioners allege that the Court of Appeals erred when it held Petitioners did not have a constitutionally protected liberty interest in continued custody over the foster children here involved.

In *Smith, supra*, this Court stated as follows with regard to the manner in which lower courts should review the issue of the alleged liberty interest of foster parents:

> . . . Here, however, whatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the state has been a partner from the outset. While the Court has recognized that liberty interest may in some cases arise from positive law sources [citation omitted], in such a case, and particularly where, as here, the claimed interest derives from a knowingly assumed

> contractual relation with the State, it is appropriate to ascertain from state law the expectations and entitlements of the parties. In this case, the limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited consitituional "liberty" in the foster family." (431 US 816, 845-846; 53 L Ed 2d 14, 36).

This court in *Smith* consequently set forth the form of analysis that a lower court should make in a case involving an alleged liberty interest on the part of foster parents.

Prior to *Smith, supra*, the supreme court never even implied that a foster parent, unrelated biologically to the foster child, had any constitutionally protected "liberty" interest in a continued relationship with the child. *Smith, supra* did not resolve that issue, as it reached no specific conclusion as to whether a foster parent has a liberty interest in a continued custodial relationship with a foster child.

The lower courts in the instant case dealt with this issue according to the direction given to them by the *Smith* decision. As is evident from the decision of District Court Judge Hillman and the decision of the Court of Appeals, the lower courts quite properly examined the specific circumstances surrounding the foster parent relationship in the instant case before deciding the issue.

Such was completely in accord with the *Smith, supra* directive. As the Court of Appeals indicated in its decision:

> . . . In this case, the plaintiffs had only a six month temporary license to conduct a foster family home at the time the two foster children were placed with them. Furthermore, the contract between the state agency and the plaintiffs placing the two children with the plaintiffs provided specifically that the state agency retained responsibility for permanent placement of the foster children. Under these cir-

> cumstances, the court concludes that at most the plaintiffs had an expectation of continuing as foster parents of the two children in question and that this did not rise to the level of a constitutionally protected liberty interest. (Court of Appeals Decision Appendix page A3-A4).

The decisions of the District Court and Court of Appeals in the instant case were also entirely consistent with decisions of other Courts of Appeal on the same issue.

In *Drummond* v *Fulton County Department of Family and Children's Services, et al*, 563 F2d 1200, (CA-5, 1977) cert denied, 437 US 910, 57 L Ed 2d 1141, 98 S Ct 3103 (1978) the Fifth Circuit ruled that there was no reasonable expectation, under Georgia law which created the foster family relationship, that such relationship would be anything but temporary:

> True liberty rights do not flow from state laws, which can be repealed by action of the legislature. Unlike property rights, they have a more stable source in our notions of interpreting human rights. The very fact that the relationship before us is a creature of state law, as well as the fact that it has never been recognized as equivalent to either the natural family or the adopted family by any court, demonstrates that it is not a protected liberty interest, but an interest limited by the very law which created it [citation omitted], 563 F2d 1200, 1207.

Although there was a trial-type hearing in *Drummond, supra*, the Court's resolution of the "liberty" question was not based on the evidence produced at the hearing, but rather on a reading of the Georgia foster care statutes in the context of other legal decisions concerned with the definition of the "liberty" interest:

> The argument that foster parents possess such a protected interest was placed squarely before, and discussed by, the Supreme Court in its recent deci-

> sion in *Smith* v *Organization of Foster Families* [citation omitted]. Although the Supreme Court did not find it necessary to resolve whether such an interest exists, Justice Brennan's discussion of the claim is helpful to our analysis. He first considered the elements which have traditionally been thought to define the concept of "family." Of course, the Court recognized that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association." Nonetheless, the Court then noted several differences between foster and natural families, particularly the fact that the foster parent relationship has its genesis in state law, unlike the biological relationship, and that with foster parents there is often a natural parent seeking to assert a competing liberty interest.
>
> We conclude that there is no such constitutionally protected interest in the context of this case. An understanding of the role of the foster parent in a child placement helps make this conslusion plain . . . in the eyes of the state, which creates the foster relationship, the relationship is considered temporary at the outset and gives rise to no state created rights in the foster parents," 563 F2d 1200 1206, 1207.

A similar situation was presented in the case of *Kyees* v *County Department of Public Welfare*, 600 F2d 693, (CA-7, 1979). In *Kyees*, the Court granted Defendant's motion for summary judgment on the basis that there was no liberty interest on the part of the foster parents which rose to the level of constitutional due process guarantees:

> We have no difficulty in narrowing the case to the question of whether the relationship between plaintiffs and John Joe created a liberty interest which the state could not impair without due process. We see no property interest involved, and no fundamental rights wholly beyond the power of the state . . .

> In *Drummond* as well as here, there were facts indicating the development of strong emotional ties between the foster parents and the foster child. In both situations, the foster care relationship continued for approximately two years before termination by the state agency. In each case it could clearly be said that the foster parents at least had reason to believe that the state agency reserved the right to terminate the relationship." 600 F2d 693, 697, 698-699.

Given such facts, the *Kyees* court had even more reason to find a liberty interest than did the trial court and Court of Appeals herein. Despite that fact, *Kyees* held against the existence of such a liberty interest.

The second reason why the writ should not be granted is because Petitioners' only remaining argument is based on an issue not raised, argued, or decided below.

The Petitioners apparently now argue that the existence of a State of Michigan administrative decision reinstating the Petitioners' temporary foster care license is dispositive of the question of procedural due process. What Petitioners fail to note is that they never raised the issue of the agency decision below, nor did they ever argue that said decision should be dispositive of the constitutional due process issue.

As indicated in the Counter-Statement of the Case, the administrative law judge's decision was dated March 26, 1980. The argument before the Sixth Circuit Court of Appeals was February 9, 1981. Despite this almost one year delay between the decision referred to by the Petitioners and their argument before the Sixth Circuit, Petitioners never made any attempt to raise the administrative law decision as relevant to their appeal to the Sixth Circuit, nor did they argue that said decision was relevant in their oral argument before the Court.

Further, the administrative law decision is not part of the substantive record in this matter. The only way it has found its way into the Court file is as an attachment to a Motion for Advancement of the Court of Appeals hearing filed by Petitioners on or about August 28, 1980. Even that particular motion makes no specific mention of the administrative law judge's decision being relevant or raising any new issues with regard to the alleged issue of procedural due process.

As a result, numerous cases indicate that the court should not consider such issue:

> The government also contends that even if Almeida-Sanchez applies to checkpoint searches, the Court of Appeals erred in voiding the search because it occurred after the date of decision of Almeida-Sanchez but before the Court of Appeals stated in *United States* v *Bowen, supra*, that it would require probable cause for checkpoint searches. Examination of the government's brief in the Ninth Circuit indicates that it did not raise this question below. On the contrary, it represented to the Court that the decision in *Bowen* would be "determinative of the issues in this case." We therefore decline to consider this issue, which was raised for the first time in the petition for certiorari. *United States* v *Ortiz*, 422 US 891, 45 L Ed 2d 623, 629-630, 95 S Ct 2585 (1975); See also *Adickes* v *Kress & Co*, 398 US 144, 26 L Ed 2d 142, 90 S Ct 1598 (1970); *Lawn* v *United States*, 355 US 339, 2 L Ed 321, 78 S Ct 311 (1958); *Husty* v *United States*, 282 US 694; 75 L Ed 629, 51 S Ct 240 (1939); *Duignan* v *United States*, 274 US 195; 71 L Ed 996; 47 S Ct 566 (1927).

Inasmuch as Petitioners neither raised said issue before the Court of Appeals, nor was the issue considered by the Court of Appeals, this Court should not grant the writ.

The third reason why the writ should not be granted is that, even assuming the administrative law judge's decision

raises a question with regard to procedural due process, it is obvious from examination of the facts in this matter that the District Court and Court of Appeals properly decided that Petitioners received sufficient due process.

This Court has consistently held that the right to due process may require different procedures in different situations:

> Once it is determined that due process applies, the question remains what process if due." *Morrissey* v *Brewer*, 408 US at 481, 33 L Ed 2d 484. We turn to that question, fully realizing as our cases regularly do that the interpretation and application of the Due Process Clause are intensely practical matters and that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." [citations omitted] *Goss* v *Lopez*, 419 US 565, 42 L Ed 2d 725, 737, 94 S Ct 729 (1975) (emphasis added).

Given this need for flexibility, the Court has often stated that the due process clause requires certain minimum procedures:

> "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v *Ordean*, 234 US 385, 394, 58 L Ed 1363, 34 S Ct 779 (1914), a right that "has" little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest." *Mullane* v *Central Hanover Trust Company*, *supra*, 314, 94 L Ed 865, (citations omitted).
>
> At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing. *Goss*, *supra*, 42 L Ed 2d 725, 737; see also, *Roth*, *supra*, (emphasis added).

The administrative law judge's decision cited by Petitioners is, in and of itself, evidence that Petitioners did receive substantial due process. The invoked Michigan statutory procedures with regard to challenging the Michigan Department of Social Services' decision to remove their temporary license. In the end, the administrative law judge decided that the State had not totally complied with such procedures. The State, therefore, reinstated the temporary license.

Totally apart from the substantial procedures provided by the state licensing statutes, the Petitioners availed themselves of additional procedures by which they received notice and a hearing with regard to the removal of the children. As paragraph 19 of their Complaint admits, they were informed of the reasons for the removal of the foster children. The Court of Appeals Appendix, pages 290-291, 49-51, and the fourth paragraph of page 286, confirm that the Petitioners contested the removal procedures and had a "hearing" with these Respondents and Michigan Department of Social Services representatives shortly after the removal of the children. At that time, Petitioners presented their arguments against removal and were told the various reasons why department and agency representatives felt that removal was necessary.

When the procedures required in *Goss, supra*, are compared to the procedures available to, and utilized by Petitioners in the instant matter, there can be no question but that Petitioners received more than those minimum due process procedures necessary under the Constitution. Taking into consideration the guidelines set forth in a variety of this Court's decisions, including *Arnnett* v *Kennedy*, 416 US 134, 40 L Ed 2d 15, 94 S Ct 1633 (1974), *Withrow* v *Larkin*, 421 US 35, 45 L Ed 2d 714, 95 S Ct 1456 (1975) and *Cafeteria Workers* v *McElroy*, 376 US 896, 6 L Ed 2d 1230, 81 S Ct 1743 (1961), the Petitioners in the instant case had numerous opportunities to receive notice of the reasons for removal and to present their arguments against such removal.

CONCLUSION

Examination of the record and decisions below indicates that the decisions of the District Court and Court of Appeals are entirely consistent with prior case law in regard to the alleged "liberty" interest of foster parents in continued custody of foster children. The record further reveals that Petitioners received all procedural due process to which they were constitutionally entitled. The Petitioners having raised no special and important reasons for the granting of the writ, the writ should therefore be denied.

Respectfully submitted,

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